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Supreme Court, U.S.
F I L E D
JUN 2 1999
CLERK

No. 98-1802

In The
SUPREME COURT OF THE UNITED STATES

BALTIMORE CITY POLICE DEPARTMENT, *et al.*,

Petitioners,

- against -

FRATERNAL ORDER OF POLICE, LODGE 3, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE CITY OF NEW YORK AND OTHER NAMED STATES, COUNTIES, CITIES AND ORGANIZATIONS ON BEHALF OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

City of New York

The City of New York and related entities ("City") have over 8,000 managerial employees, and thousands more supervisory employees, whom the City has always considered within the exemption in the Fair Labor Standards Act ("FLSA") for persons "employed in a *bona fide* executive, administrative or professional capacity". *See* 29 USC § 213(a)(1). Approximately 5,000 of these employees have sued the City for back overtime and liquidated damages in six lawsuits on the theory that, under Department of Labor ("DOL") regulations, they are actually hourly employees. *See* 29 CFR Part 541.

One of those cases went to a judgment that was adverse to the City on the principal legal issues, and the United States Court of Appeals for the Second Circuit affirmed. *Yourman v. Dinkins*, 826 F Supp 736 (SDNY, 1993), *aff'd*, 84 F3d 655 (2d Cir., 1996). This Court granted the City's petition for a writ of certiorari and remanded the case to the Court of Appeals for reconsideration in light of this Court's ruling in *Auer v. Robbins*, 519 US 452 (1997). *Giuliani v. Yourman*, 519 US 1145 (1997). The Court of Appeals remanded the case to the District Court, the parties made additional submissions, and the parties now await a ruling by the District Court on the parties' renewed cross-motions for summary judgment.

The previous judgment in *Yourman* was close to $14 million for back overtime, liquidated damages and attorneys' fees. In a second case, although judgment has not yet been entered, back overtime and liquidated damages have been

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[1] Counsel for a party did not author this brief in whole or part. No person or entity other than the *amicus curiae*, its members, or counsel have made any monetary contribution to the preparation or submission of the brief.

calculated to be over $6 million. *Feaser v. City of New York*, 93 Civ. 5739 (SDNY, 1997). A very rough estimate is that the City's exposure in the four other lawsuits may be as much as $30 million.

The DOL regulations, as applied in *Yourman*, leave the City between the Scylla and Charybdis of either making virtually all of its previously-exempt employees hourly employees, or of revising its policies to mirror the "salary basis test" for determining whether an employee is within the exemption for managerial employees. *See* 29 CFR § 541.118. Making all of its managers hourly employees would be costly; the City estimated, in the record in *Yourman*, that if it were to make all of its managers hourly employees, and if each manager were to work two hours of overtime each week, then the annual cost to the City would be $60 million.

The alternative of revising policies to satisfy the salary basis test is no better. The City revised its policies after the District Court ruled on liability in *Yourman* in 1993. The policies now provide that under no circumstances may a manager be docked salary because of a court appearance or temporary military leave, even if all relevant leave balances have been exhausted. *See* 29 CFR § 541.118(a)(4). This obviously creates the potential for abuse by unscrupulous employees and at least arguably would cause a public employer to violate the public accountability principle.[2]

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[2] The public accountability principle is that public employees must account for all hours for which they are paid and that public employees must not be paid for time spent not working. *See generally Service Employees International Union v. County of San Diego*, 60 F3d 1346, 1352 & n.2 (9th Cir., 1995), *cert. denied*, 516 US 519 (1996); *Mueller v. Reich*, 54 F3d 438, 442 (7th Cir.), *vacated and remanded*, 519 US 1144 (1997), *complaint dismissed*, 133 F3d 1063 (7th Cir., 1998); *Hilbert v. District of Columbia*, 23 F3d 429, 435 (DC Cir., 1994) (Henderson, J, (continued...)

The revised policies also provide that disciplinary sanctions that would involve a loss of salary, such as a fine or suspension, may not be imposed. *See* 29 CFR § 541.118(a)(5) (permitting penalties only for violations of safety rules of major significance). Termination and demotion, the only remaining meaningful penalties, are very serious penalties, and the City is loath to impose them unless it believes that the infraction is equally serious and that the courts will not overturn them under the progressive discipline principle.[3]

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[2] (...continued)
concurring in part and dissenting in part); 57 Fed. Reg. 37,666 (1992). In New York, article VIII, section 1 of the state constitution prohibits the gift of public funds and is understood to mean that public employees may not be paid for time not spent working. *Boyd v. Collins*, 11 NY2d 228, 234, 228 NYS2d 228, 182 NE2d 610 (1962), *overruled, in part, on other grounds*, 46 NY2d 450, 414 NYS2d 109, 386 NE2d 1077 (1979), *rehearing denied*, 46 NY2d 1076 (1979); *see also Brooklyn Society for Prevention of Cruelty to Children, Inc. v. Blum*, 56 NY2d 909, 912, 453 NYS2d 408, 438 NE2d 1123 (1982); *Mullane v. McKenzie*, 269 NY 369, 377, 199 NE 624 (1936), *rehearing denied*, 270 NY 563, 200 NE 319 (1936). Nothing in the record or plaintiffs' papers in *Yourman*, nor any judicial decision of which we are aware, names a single state or local government entity that does not operate under the public accountability principle.

[3] The progressive discipline principle, which applies to public sector employers, is that the punishment must not be disproportionate to the offense in light of the employee's disciplinary record. This principle is followed in New York. *See Pell v. Board of Education*, 34 NY2d 222, 234-35, 356 NYS2d 833, 313 NE2d 321 (1974); *McAvoy v. Ward*, 145 AD2d 378, 381, 535 NYS2d 721, 723-24 (1st Dept., 1988), *leave to appeal denied*, 74 NY2d 606, 544 NYS2d 820, 543 NE2d 85 (1989); *Hutchinson v. Lloyd*, 216 AD2d 3, 627 NYS2d 46 (1st Dept.), *leave to appeal denied*, 86 NY2d 710, 635 NYS2d 947, 659 NE2d 770 (1995).

OTHER AMICI

The other *amici* consist of various states, counties, cities and organizations[4] that work with such governmental entities. As set forth below, their statements illustrate some of the extraordinary financial costs and administrative difficulties already incurred as a result of requiring governmental entities to comply with the FLSA and its implementing regulations.

STATES

State of Alabama

The State of Alabama joins as an *amicus* on behalf of petitioners. Alabama is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

State of Colorado

The State of Colorado joins as *amicus* on behalf of petitioners. Colorado is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations. For example, to date, approximately 200 plaintiffs have sued Colorado in five separate actions involving the FLSA. So far, the State has paid out approximately $130,000 in overtime compensation on FLSA claims. Colorado estimates its future exposure for such claims to be in the range of $4 million.

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[4] Pursuant to Rule 37 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

State of Iowa

The State of Iowa joins as an *amicus* on behalf of petitioners. Iowa is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

State of Nevada

The District Court's award of summary judgment to the plaintiffs on their 29 CFR Part 541 overtime claims, in *Benzler v. State of Nevada*, CV 9162-ECR (DC Nev., 1992), affected many thousands of other state employees as well, directly resulting in payouts by Nevada of more than $6 million in overtime compensation. Since *Benzler*, another four suits brought under the FLSA in federal court, involving 97 plaintiffs, have cost the State an additional $310,000.

State of South Dakota

The State of South Dakota joins as an *amicus* on behalf of the petitioners. South Dakota is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

State of Utah

The State of Utah joins as an *amicus* on behalf of petitioners. Utah is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

COUNTIES

Anne Arundel County, Maryland

Anne Arundel County has paid out $2,865,436.87 in a FLSA case for overtime pay brought by firefighters of the Anne Arundel County Fire Department. *See West v. Anne Arundel County, Maryland*, 137 F3d 752 (4th Cir.), *cert. denied*, 119 S Ct 607 (1998). Furthermore, Anne Arundel County is defending another FLSA suit in *Praschak v. Anne Arundel County, Maryland*, No. B-97-3701 (D. Md.).

Prince George's County, Maryland

Prince George's County of Maryland joins as an *amicus* on behalf of petitioners. Prince George's County is subject to the FLSA and, as such, it must and does incur the cost of compliance with the statute and its implementing regulations.

CITIES

City of Los Angeles, California

Since 1985, the City of Los Angeles has defended, or is defending, eight cases involving some 1500 employees, all of which involve some aspect of the salary basis test at issue in *Baltimore City Police Department v. Fraternal Order of Police, Lodge 3, et al.,*. The City's potential liability for these eight cases exceeds $13 million. For example, the City has settled the following cases: *Weber v. City of Los Angeles*, CV 91-1234, a case involving 184 employees, settled for $2 million; *Rusk v. Department of Water & Power*, CV 92-7316, a case involving 135 employees, settled for $7 million. Similarly, the City has sustained judgments and is appealing, or planning to appeal, the following cases: *Higuera v. City of Los Angeles*, CV 93-2527, a case involving 285 employees,

adverse judgment in the amount of approximately $1 million; and *Block v. City of Los Angeles*, CV 91-5461, adverse judgment in the amount of approximately $1 million. Moreover, plaintiffs have appealed a District Court judgment rendered in *Morsch v. City of Los Angeles*, CV 91-0401, a case involving approximately 98 employees, where approximately $5 million is at issue.

City of Phoenix, Arizona

Since 1985, the City of Phoenix has paid out approximately $4.2 million to settle FLSA litigation, including $3.65 million in a class action suit brought on behalf of 2500 police officers with overtime claims, *Petrocino v. City of Phoenix*, No. C-545439 (Maricopa Co. Superior Ct., 1986); and over $338,000 in a suit for overtime pay brought by police sergeants and lieutenants pursuant to 29 CFR Part 541, *Sullivan, et al. v. City of Phoenix*, CIV 91-0557, 91-0647, 92-0213 (DC Ariz., 1991-92). The City is currently being sued by two attorneys who provide legal advice to its police department, with the plaintiffs seeking approximately $160,000 in overtime for hours worked above forty hours per week. *Kavanaugh v. City of Phoenix*, CIV 98-0377 (DC Ariz., 1998), and *Edwards v. City of Phoenix*, CIV 98-0378 (DC Ariz., 1998).

Salt Lake City, Utah

Salt Lake City is the capital of Utah and it is the State's largest city. It is a quality employer and uses its best efforts to comply with all state and federal law. The City has a sophisticated, unionized, well-paid workforce with whom it enters into collective bargaining agreements. The City has been the target of numerous DOL audits for FLSA compliance, including several of its police department. Responding has been burdensome and has diverted significant economic and human resources away from providing public

services. The City is presently appealing a $53,000 civil penalty wrongfully assessed by DOL which, if unchallenged, would remove funding of one police officer for an entire year.

The City and County of San Francisco, California

"*Amici* City and County of San Francisco" ("San Francisco") have at least 5305 managerial and supervisory employees considered within the executive, administrative and professional exemption from FLSA overtime requirements. *See* 29 USC § 213(a)(1). San Francisco maintains collective bargaining agreements with employee organizations, as well as work rules, that apply to these employees and may, while pursuing proper and fair objectives, run afoul of DOL limitations on the exemption. San Francisco also employs 610 police personnel and 1254 fire and paramedic personnel who are partially exempt under the FLSA. *See* 29 USC § § 207(k). DOL limitations, however, create the possibility of substantial litigation and the threat of substantial judgments over the details of the exemption. Indeed, several partially exempt employees recently filed suit against San Francisco. *See Rooker v. City and County of San Francisco*, 99-1095-VRW (ND, Ca., Complaint filed March 9, 1999). The validity of the DOL regulations will be a central issue of the litigation.

City of Warner Robins, Georgia

In December 1996, the City of Warner Robbins settled a FLSA case brought by a group of police officers in the amount of $432,500. As a result, the budget for the City's current fiscal year allocates an additional $515,139 for overtime and on-call pay above the $11,833,452 funded for general salaries.

ORGANIZATIONS

International Municipal Lawyers Association

The International Municipal Lawyers Association ("IMLA") is a nonprofit professional organization that has provided services and programs to local government lawyers since 1935. With a membership of more than 1500, IMLA is the oldest and largest association of attorneys that represent local governments.

Since its establishment, IMLA has served its membership by being an advocate for the interests, positions and views of local governments involved in cases pending in the United States Supreme Court, in federal circuit courts, and in state appellate and supreme courts that present legal issues, such as those involved here, that may have a significant impact on a substantial number of governments across the United States.

International Personnel Management Association

The International Personnel Management Association ("IPMA") represents over 1700 member agencies including civil service commissions, merit system boards, and personnel departments at the federal, state and local levels of government and more than 4200 professional members. The Association represents over 55,000 individuals, primarily human resource professionals and administrators in the public sector. IPMA attempts to foster and develop interest in sound human resources administration, by providing a focus and forum for human resources professionals throughout the United States and abroad.

Michigan Municipal League

The Michigan Municipal League ("MML") is a nonprofit association organized for the purpose of improvement of municipal government in Michigan by cooperative effort. It is the only organization of its kind in the State of Michigan and represents 516 cities and villages. The MML has been in existence since 1899. The Michigan Association of Municipal Attorneys is affiliated with the MML and its first chartered section. Programs and services of the MML include: educational seminars; publications; research; legislative advocacy; labor relations, human resources and management consulting services; and risk management and insurance.

Nearly 400 of the League's cities and villages are also members of the MML's Legal Defense Fund. The purpose of the Legal Defense Fund is to provide support and representation for its member cities and villages in litigation of statewide municipal significance in state and federal courts. In addition, the MML has been involved, through its Legal Defense Fund, in matters in other states that have an impact on local government issues. As such, the Legal Defense Fund, on behalf of its members, must be concerned with compliance with the FLSA and its implementing regulations, and may represent its members in litigation involving these matters.

National Public Employer Labor Relations Association

The National Public Employer Labor Relations Association ("NPELRA") is the professional association for labor relations directors serving city, county, state and special district governments. NPELRA members negotiate contracts with the unions representing governmental employees, including police officers. In their daily work, NPELRA

members must apply both state and local labor laws, including the FLSA.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

We respectfully submit that the foregoing statement of the interests of the *amici* makes plain the extraordinary importance of this case to state and local governments throughout the Nation. *Amici* and other state and local governments face enormous potential liability to employees. If ordered to pay these employees back overtime and liquidated damages, then these government entities would find themselves paying enormous sums for work performed long ago and, more important, for work performed by employees who understood both that they were to work as many hours each week as necessary to discharge their responsibilities and that they they would not be paid overtime for any such additional work.

Looking forward, governmental *amici* may be required either (a) to pay overtime to supervisory employees, notwithstanding the fact that such employees were hired with the understanding that they would be paid salaries which did not include any overtime pay; or (b) to bring their personnel policies into conformity with regulations that were adopted in an era in the Nation's economic history much different from that of the present, and at a time when the FLSA specifically did not apply to the public sector. *See* 19 Fed. Reg. 4405 (1954) (initial adoption of "salary basis test") (discussed at DOL Exemptions from Minimum Wage and Overtime Compensation Requirements of the Fair Labor Standards Act; Public Sector Employees, 57 Fed. Reg. 37,666 (1992); *see also* 29 CFR § 541.118(a)(5).

In addition, the question of whether the national political process has failed -- within the meaning of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US 528

(1985) -- could not be more squarely presented. Below, the Court of Appeals stated, in part, "[Petitioners] presented no evidence to suggest that [they are] unable to ... lobby Congress to amend the [FLSA] or elect new congressmen who might do so ...." (7a).[5] We respectfully submit that the Court overlooked what is perhaps the most significant way in which the national political process has failed the states and cities in this instance. Like the other states, counties, and municipalities appearing as *amici* in support of this petition, the City of New York has no vote; however, the literally thousands of plaintiffs in the actions against the City mentioned above have literally thousands of votes. The City of New York does not contribute to the campaigns of senators and representatives. The plaintiffs in these cases, however, as well as those in the cases described by the other *amici*, may do so either individually, or collectively, through Political Action Committees or, where applicable, through their unions (*see* 104a, 107a-108a, 124a).

In short, petitioners submitted highly probative affidavits, of highly qualified experts, explaining that the national political process has failed the states and cities in this instance, both in the foregoing way and in many others (99a-132a). Moreover, these same experts provided extensive deposition testimony in support of this position, and that testimony is in the record at bar. The City of New York's Office of the Corporation Counsel has monitored the caselaw in this area and, from time to time, has also had occasion to speak with attorneys for other public defendants in similar cases. We are not aware of another case in which a public defendant has developed such an extensive record on the question of whether the national political process has failed the states and local governments. Should this Court agree

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[5] Unless otherwise indicated, numerical references in parentheses refer to pages in the Appendix to the Petition for a Writ of Certiorari.

with petitioners, that if the proper balancing test under *Garcia* is applied then petitioners' proof establishes that the national political process has failed, then it follows that states and local governments would no longer be required to bear the burden of complying with DOL's arbitrary interpretation of the managerial exemption.

If the evidence in the record herein does not call for a review as to whether there has been a failure of the political process as contemplated by *Garcia* and *South Carolina v. Baker*, 485 US 505, 512 (1988), *rehearing denied*, 486 US 1062 (1988), then we cannot imagine what, in fact, would constitute such a failure.

CONCLUSION

For all of the above-stated reasons, the *amici* respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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